APPENDIX-1 OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS FILED DECEMBER 21, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
DEC 21 2001
CHARLES R. FULBRUGE III
CLERK

No. 01-31113
USDC No. 01-CV-1423
No. 99-CR-50046-1

UNITED STATES OF AMERICA
Plaintiff – Appellee,

v.

MARCUS JONES, also known as Mac Daddy,
Defendant – Appellant.

Appeal from the United States District Court
For the Western District of Louisiana

ORDER:

Marcus Jones, federal prisoner number 10250-035, has applied for a certificate of appealability ("COA") for an appeal from the district court's order denying his motion to vacate, set aside or correct judgment under 28 U.S.C. § 2255. SEE 28 U.S.C.§ 2253 (c) (1) (B).

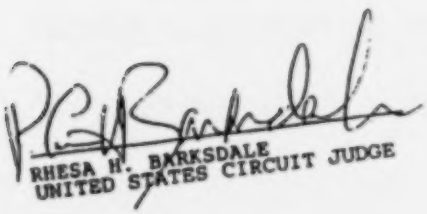
Jones contended in the district court that he received ineffective assistance of counsel in connection with the entry of his guilty plea and at sentencing. Jones has failed to brief this issue in his COA application. Accordingly, it is waived. See Hughes v. Johnson, 191 F.3d 607, 613 (5th Cir. 1999).

Jones complains: (1) that he was sentenced on the basis of a premature presentence report ("PSR"), which affected his guideline level; (2) that his right to due process was violated because he was sentenced on the day he entered his guilty plea and should have been given an opportunity to respond to the PSR; (3) that he was sentenced on the basis of a quantity of drugs which exceeded that alleged in the indictment; (4) that the indictment is defective in that it charged him with two crimes; and (5) that the Government never established that the substance at issue was crack cocaine. Jones has not shown cause and prejudice for failing to raise these issues on direct appeal. See United States v. Shaid, 937 F.2d 228, 231-32 (5th Cir. 1991) (en banc).

Jones contends that he was actually innocent because "crack" cocaine had not been scheduled as a drug and, accordingly, he pleaded guilty to conduct which had not been criminalized. Jones has failed to make a substantial showing of the denial of a constitutional right as to this issue. See 28 U.S.C.§ 2253 (c) (2); Slack v. McDaniel, 520 U.S. 473, 483

(2000) (COA standard); see also United States v. Wilson, 116 F.3d 1066, 1089 (5th Cir.), opinion vacated in other part on grant of rehearing en banc, 123 F.3d 213 (5th Cir. 1997); United States v. Deisch, 20 F.3d 139, 150-51 (5th Cir. 1994). COA is DENIED.

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FILED
USDC, WESTERN DISTRICT OF L.
ROBERT H. SHEMWELL, CLERK
DATE 8, 20, 01
BY cw

APPENDIX-2 ORDER OF THE UNITED STATES DISTRICT COURT WESTERN DIVISION FILED AUGUST 20, 2001

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF LOUISIANA SHREVEPORT DIVISION

STACEY JONES — CIVIL ACTION NOS. 01-1422 & 01-1423
MARCUS JONES — CRIMINAL ACTION NO. 99-50046-01 & 02

VERSES — JUDGE DONALD E WALTER

UNITED STATES OF AMERICA

MAGISTRATE JUDGE PAYNE

ORDER

Before this Court are Motions under 28 U.S.C. §2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody [Doc. ##102 and 103] filed by Petitioners, Stacey Jones and Marcus Jones.

IT IS ORDERED that the Petitioners' Motions under 28 U.S.C. §2255 to Vacate, Set Aside or Correct Sentence by a Federal Custody [Doc. ## 102 and 103] be and hereby are **DENIED.**

THUS DONE AND SIGNED, in Shreveport, Louisiana, this 17__ day of August, 2001.

"S

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE"

FILED
USDC, WESTERN DISTRICT OF LA
ROBERT H. SHEMWELL, CLERK
DATE 8/20/01
BY

APPENDIX-3 MEMORANDUM AND RULING OF THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF LOUISANA SHREVEPORT DIVISION AUGUST 18, 2001.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

STACEY JONES MARCUS JONES	CIVIL ACTION NOS. 01-1422 & 01-1423 CRIMINAL ACTION NO. 99-50046-01 &02
VERSES	JUDGE DONALD E. WALTER
UNITED STATES OF AMERICA	MAGISTRATE JUDGE PAYNE

MEMORANDUM RULING

Before this court are Marcus Jones and Stacey Jones' Motions under 28 U.S.C. §2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody [Doc. ##102 and 103, respectively]. For the reasons assigned herein, the Jones' Motions [Doc. ##102 and 103] are **DENIED.**

STATEMENT OF THE CASE

On April 22, 1999, the Petitioners were indicted in a five count Indictment [Doc. #1]. Count One charged the Petitioners with knowingly

and intentionally conspiring to distribute and possess "fifty (50) grams or more of a mixture or substance containing cocaine base, also known as crack cocaine, and 5 kilograms or more of a mixture or substance containing cocaine, also known as powder cocaine...in violation of Title 21, United States Code, Section 841(a)(1)[.]" Count Three charged the Petitioners with knowingly and intentionally attempting to possess with the intent to distribute "fifty (50) grams or more of a mixture or substance containing cocaine base, also known as crack cocaine...in violation of Title 21, United States Code, Section 841(a)(1)[.]"

On September 21,1999, the Petitioners each entered a plea of guilty to Count Three. (Mins. Ct. [Doc ##51 and 55].)

On June 16, 2000, this court recalled its acceptance of the Petitioners' guilty pleas and reinstated the Petitioners' plea of not guilty to all counts. (Scheduling Order [Doc. #83].)

On August 1,2000, the Petitioners each entered a plea of guilty to Count One. (Mins. Ct. [Doc. ##91 and 93].)

On August 4, 2000, Petitioner Marcus Jones was sentenced to one hundred eight-eight (188) months imprisonment and Petitioner Stacey Jones was sentenced to two hundred ninety-two (292) months imprisonment. (J. Crim. Case [Doc. ##97 and 92, respectively] at 2.)

The Petitioners never appealed either their pleas or sentences. (pets.' Brs. Supp. Pets.' Mots. [Doc. ##102 and 103] at 2.)

On July 26, 2001, the Petitioners filed the instant Motions [Doc. ##102 and 103], seeking relief pursuant to 28 U.S.C. §2255.

ANALYSIS

The Petitioners' Motions [Doc. ##102 and 103] are based on claims of ineffective assistance of counsel. (Pets' Brs. Supp. Pets.' Mots [Doc. ##102 and 103] at 3.) Their ineffective assistance of counsel claims are predicated on an argument that this Court lacked subject matter jurisdiction because the Indictment [Doc. #1] charged the Petitioners with offenses that were not criminal. Specifically, the Petitioners challenge those counts related to the possession and attempted possession of cocaine base, "crack cocaine." (Id.) The Petitioners allege that cocaine base, "crack cocaine," was a new drug that that not been scheduled as a controlled substance prior to the filing of their Indictment [Doc. #1]. (Id.) Therefore, the Petitioners claim that their Indictment [Doc. #1] failed to charge a crime and that their pleas/convictions as to Count One of that Indictment [Doc. #1] were defective and/or constitutionally infirm. (Id.)

Further, although it is not clear from their Motions [Doc. ##102 and 103], the Petitioners also appear to seek relief because Count One of their indictment charged the possession of two drugs, cocaine base, "crack

cocaine," and cocaine powder. (See Pets.' Brs. Supp. Pets.' Mots. [Doc. ##102 and 103] at 17-18 and 20-21.) Because two controlled substances were charged in Count One, the Petitioners claim that the length of their sentences should have been limited to the lesser of the sentences that the Court could have imposed based on Count One. That is, the Petitioners claim that they should have been sentenced for possession of cocaine powder and not for cocaine base, "crack cocaine." Alternately, the Petitioners allege that their sentences were imposed in violation of the principles established in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). (Id. at 17-18.)

Finally, the Petitioners claim that there was error because the substance that they were charged with possessing was never tested to see if it would burn. (Id. at 21-22.) Thus, the Petitioners claim it is uncertain whether this substance was cocaine base, "crack cocaine," or cocaine powder. (Id.)

I The relief requested by the Jones is not properly sought in a §2255 motion.

"Habeas corpus relief is extraordinary and 'is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." Kinder v. Purdy, 222 F.3d 209, 213 (5th

Cir. 2000) (quoting United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992)(citation omitted)). Further, to merit relief under 28 U.S.C.§2255 for an issue not raised in a direct appeal, a petitioner must demonstrate "both cause for the procedural default in not raising the issue on direct appeal and some form of actual prejudice that he suffered ad a result of the error." United States v. Samuels, 59 F.3d 526,528 (5th Cir. 1995) (footnote omitted); United States v. Placente, 81 F.3d 555, 558 (5th Cir. 1996). Finally, [n]on-constitutional errors may not be raised in a section 2255 petition unless the defendant demonstrates that 'the error could have been raised on direct appeal, and if condoned, would result in a complete miscarriage of justice[.]'" Samuels, 59 F.3d at 528 (footnote omitted).

In the instant matter, the Jones fail to offer any cause for their procedural default. They only state that an appeal was not filed. (Pets' Brs. Supp. Pets.' Mots [Doc. ##102 and 103] at 2.) Therefore, Motions [Doc ##102 and 103] must be denied.

Therefore, even if the Jones proffered an acceptable reason for their procedural default, they would not be entitled to relief under §2255. Instead, each of the Jones' challenges would fail because they cannot demonstrate that any prejudice was caused by the errors that they assert.

A. The Petitioners' claim regarding this Court's subject matter jurisdiction are flawed.

The Petitioners argue that they received ineffective assistance of

counsel in violation of Strickland v. Washington, 466 U.S. 668, 104 S,Ct. 2052, 80 L.Ed.2d 674 (1984), when their trialcounsels failed to claim that this Court lacked subject matter jurisdiction. (Pets' Brs. Supp. Pets.' Mots. [Doc. ##102 and 103] at 3.) Specifically, thePetitioners allege that cocaine base, "crack cocaine," is not a controlled substance and thus cannot support a conviction under 21 U.S.C. §841(a)(1).(Id.) However, the Petitioners; claims are counter to Fifth Circuit precedent.United States v. Deisch, 20 F.3d 139, 151 (5th Cir. 1994) ("Cocaine base as a form of cocaine, was a Controlled substance before the term'cocaine base, was ever introduced into Title 21[]").

Therefore, the Petitioners' aguments that they received ineffective assistance of counsel when their rial counsels did not challenge this Court's subject matter jurisdiction are without merit. Thus, the failure of the Petitioners' trial counsels to raise thes issues was not ineffective assistance of counsel as it did not fall below objective standards of reasonableness or cause prejudice to the Petitioners. See Strickland, 466 U.S. at 687-88, 104 S.Ct. at 2064.

B The Petitioners' challenges regarding the length of their sentences i not justified.

The Petitioners also challenge the length of their sentences based on alleged Apprendi violations. (See Pets.' Brs. Supp. Pets.' Mots. {Doc. ##102-103] at 17-18.) Specifically, he Petitioners challenge the

length of the sentences that this Court imposed. (Id.) However, the Fifth Circuit has found that there is no Apprendi error when a court utilizes its discretion and imposes (see footnote)

> (foot note) The Petitioners also challenge that their Indictment was defective as it charged them with possession of cocaine base," crack cocaine," which the Petitioners claim is an uncontrolled drug. (Pets.' Brs. Supp. Pets.' Mots. [Doc. ##102-103] at 16-17.0 The Petitioners argue that their Indictment[Doc. #1] lacked s *corpus delicti* as it charged them with possession of an "uncontrolled drug[.]" (Id.) However, for the reasons discussed above, cocaine base, "crack cocaine," was a controlled substance when the Petitioners were indicted.
>
> Alternately, the Petitioners claim to have suffered prejudice because the government did not follow its own procedural rules before criminalizing the possession of attempted possession of cocaine base, "crack cocaine." See Accardi v. Shaughnessy, 347 U.S. 260,74 S. Ct. 499,98 L.Ed 681 (1954).
>
> However, the Petitioners do not allege that there was error, procedural or otherwise, when cocaine was designated as a controlled substance. As cocaine base was scheduled, in fact if not in name, as a controlled substance at the moment that cocaine was scheduled as a controlled substance, the Petitioners fail to establish any of their alleged Accardi violations. See Deisch, 20 F.3d at 151.
>
> Thus, the Petitioners' Indictment [Doc. #1] was sufficient, and the Petitioners' counsels had no basis on which to challenge the Indictment [Doc. #1]. Therefore the Petitioners fail to demonstrate that their counsels' failure to challenge their Indictment [Doc. #1] satisfies either the deficient counsel or prejudice prong of Strickland. (end of footnote)

a sentence that is less than the statutory maximum for the crime of which the defendant has been convicted. United States v. Clinton , No. 99-30253, 2001 WL 721366, at *2 (5th Cir. June 27, 2001) (expressly rejecting "the argument that Apprendi applies to enhancements based upon the sentencing

guidelines, whether tied to quantity or some other relevant fact, which do not cause the sentence to exceed the statutory range[]").

Assuming that the maximum length of the Jones' sentences should be limited to that imposed for an offense involving fifty grams of cocaine base ("crack cocaine"), 21 U.S.C. §841(b)(1)(A) provides for a sentence range of ten years to life for an offense.

[2]Thus, both Marcus Jones' sentence of 188 months and Stacey Jones sentence of 292 months were below the maximum statutory sentence.

Therefore, the failure of the Petitioners' trial counsels to raise these issues did not fall below objective standards of reasonableness or cause prejudice to the Petitioners. See Strickland, 466 U.S. at 687-88, 104 S. Ct. at 2064.

C. The Petitioners' claim regarding a multiple-object conspiracy involving cocaine powder and cocaine base, "crack cocaine," fail.

The Petitioners next argue that they were prejudiced Because Count One of their Indictment {Doc. #1] charged that they conspired to distribute both more than fifty grams of cocaine base, "crack cocaine," and more the five kilograms of powder cocaine.

The Petitioners argue that they therefore were entitled to lower sentences. See United States v. Cooper, 966 F2d 936,940 (5th Cir. 1992) (the punishment for participating in a multiple-object conspiracy may not exceed the statutory maximum for the offense carrying the least sever penalty).

In fact, 21 U.S.C. §841(b)(1)(A) establishes a statutory sentence range of ten years to life for offenses involving "5 kilograms or more of a mixture or substance containing a detectable amount" of cocaine. Likewise, 21 U.S.C. §841(b)(1)(A) provides for a sentence range of ten years to life for an offense involving fifty grams of cocaine base ("crack cocaine").

Therefore, the Petitioners' arguments are without merit, and the failure of the Petitioners' trial counsels to raise these issues did not fall below objective standards of reasonableness or cause prejudice to the Petitioners. See Strickland, 466 U.S. at 687-88, 104 S. Ct. 2064.

D. The Petitioners' claims regarding the Government's failure to conduct burn testing of the cocaine base,"crack cocaine," involved in the Petitioners' offenses are without merit.

The Petitioners' final allegations are that the Government failed to conduct burn testing of the cocaine base, "crack cocaine," involved in the offenses. (Pets.' Brs. Supp. Pets.' Mots.[Doc. ##102 and 103] at 21-

22.) Because these allegations address alleged non-constitutional errors, they "may not be raised in a section 2255 petition unless the [Petitioners] demonstrate[] that 'the error could not have been raised on direct appeal, and if condoned, would result in a complete miscarriage of justice[.]'" Samuels, 59F.3d at 528 (footnote omitted). The Petitioners do not offer any evidence on either of these issues.

Indeed, the Petitioners both admitted that they participated in offenses involving cocaine base, "crack cocaine," and not powder cocaine. (Stipulated Factual Bases Guilty Plea [Doc. #96].)

Therefore, the Petitioners' arguments are without merit. Further, the failure of the Petitioners' trial counsels to raise these issues did not fall below objective standards of reasonableness or cause prejudice to the Petitioners. See Strickland, 466 U.S. at 687-88, 104 S. Ct. at 2064.

CONCLUSION

For the above reasons, the constitutional errors alleged by the Petitioners fail to state a ground for the Court to grant the Petitioners' Motions [Doc ##102 and 103]. The petitioners are unable to demonstrate that they suffered any prejudice as a result of these alleged errors. See Samuels, 59F.3d at 528. Further, the Jones' Motions [Do. ##102 and 103] are denied insofar as they alleged non-constitutional errors, such as the failure of the Government to conduct burn test on the cocaine base, "crack cocaine" involved in their offenses, because these allegations did not, assuming that they have been established, "result in a complete miscarriage of justice[.]" (Id)

For the foregoing reasons, the Court finds that the Petitioners' Motions under 28 U.S.C.§2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody [Doc. ##102 and 103] must be **DENIED.**

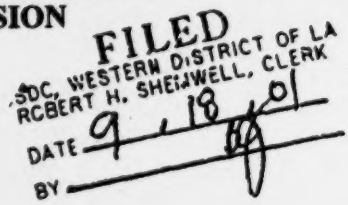
THUS DONE AND SIGNED in Shreveport, Louisiana, this 17 day of August, 2001.

"S

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

APPENDIX-4 DENIAL OF CERTIFICATE OF APPEALABILITY OF THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF LOUISANA SHREVEPORT DIVISION FILED SEPTEMBER 18, 2001

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION



UNITED STATES OF AMERICA

VERSES

MARCUS JONES

CRIMINAL NO.: 5:99CR50046-01
JUDGE WALTER
MAG. JUDGE PAYNE

CERTIFICATE OF APPEALABILITY

A final order having been filed in the above-captioned habeas case, the court, considering the record in this case and requirements of 28 U.S.C. § 2253, hereby finds that:

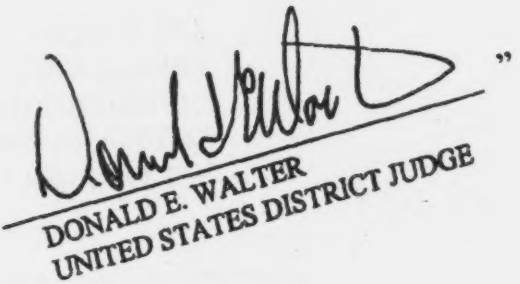
X The certificate of appealability is DENIED because the Applicant has failed to demonstrate a substantial Showing of the denial of a constitutional right.

__ The certificate of appealability is GRANTED for the below reasons:

The applicant has made a substantial showing that the following Issues constitute a denial of a constitutional right:

Signed at Shreveport, Louisiana, this 17 day of September, 2001.

"S



DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

APPENDIX-5 PETITIONERS NOTICE OF APPEAL TO THE FIFTH CIRCUIT COURT OF APPEALS FILED SEPTEMBER 10, 2001

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
SEP 10 2001
ROBERT H. SHEMWELL, CLERK
BY _____ DEPUTY

MARCUS D. JONES
#10250-035 G-UNIT
P.O. BOX 7000
TEXARKANA, TX 75505-7000

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

MARCUS JONES PETITIONER	)	CR No. 99-50046-01
v.	)	CV No. 01-1423
UNITED STATES OF AMERICA, RESPONDENT	)	

NOTICE OF APPEAL

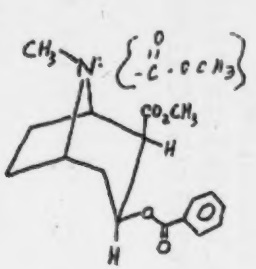
COMES NOW, MARCUS JONES, PETITIONER, and files his NOTICE OF APPEAL, from this Court's 8-20-01 MEMORANDUM and RULING of his 28 U.S.C. 2255, signed by Judge Donald E Walter, to the UNITED STATES COURT OF APPEALS for the FIFTH CIRCUIT.

"S Marcus Jones"
MARCUS JONES

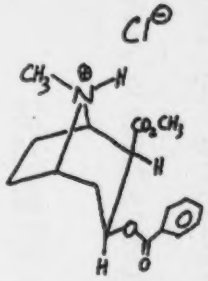
F-1

APPENDIX-6 CHEMICAL COMPOSITION CHART OF COCAINE AND CRACK COCAINE.

ACID BASE REACTION: CONVERSION OF COCAINE BASE TO COCAINE HYDROCHLORIDE.



+ HCl ⟶



COCAINE BASE

$C_{17}H_{21}NO_4$

303

HYDROGEN CHLORIDE (ACID)

COCAINE HYROCHLORIDE (SALT)

$C_{17}H_{22}NO_4Cl$

$C_{17}H_{21}NO_4 \cdot HCl$

340

COC BASE + HCl ⟶ COC · HCl